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No. 03-1342

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under this Court's established precedent, a state is free to adopt and apply choice of law rules so long as there exists a significant aggregation of contacts, creating state interests, such that the resulting choice of law is neither arbitrary nor fundamentally unfair. In this case involving identical defective minivan airbags so dangerous that the petitioner refuses to even use them as replacement parts in these very vehicles, petitioner's own evidence established that the claims in this case are so related to Michigan that virtually all the evidence offered by either party in this case emanates from conduct occurring in Michigan. Faced with this evidence, the Oklahoma Supreme Court applied its preexisting choice of law rules (those set forth in the Restatement (Second) of Conflict of Laws) and determined that Michigan law applied to respondents' warranty claims and laws of the state of purchase applied to respondents' fraud claims. The questions presented are:

1. Does the application of the law of the state with contacts so significant that "virtually all of the evidence offered by either side" emanates from conduct occurring there comport with due process and this Court's decisions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)?

2. Does the application of the law of the state with contacts so significant that "virtually all of the evidence offered by either side" emanates from conduct occurring there constitute unconstitutional extraterritorial regulation in violation of the commerce clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 6

REASONS FOR DENYING THE WRIT 9

I. THE APPLICATION OF THE LAW OF THE STATE WITH CONTACTS SO SIGNIFICANT THAT "VIRTUALLY ALL OF THE EVIDENCE OFFERED BY EITHER SIDE" EMANATES FROM CONDUCT OCCURRING THERE COMPORTS WITH DUE PROCESS AND THIS COURT'S DECISIONS IN *SHUTTS* AND *ALLSTATE* 10

A. The Decision Below Represents a Straightforward Application of this Court's Opinions in *Shutts* and *Allstate* 10

B. Whatever Conflict Exists Between the Decision of the Oklahoma Supreme Court and the Opinions of other State Supreme Courts and U.S. Courts of Appeals is Based Upon the Application of this Court's Opinions in *Shutts* and *Allstate* to the Facts of those Cases not Differences in Interpretation of *Shutts* and *Allstate* 15

TABLE OF CONTENTS – Continued

Page

II. THE APPLICATION OF THE LAW OF THE STATE WITH CONTACTS SO SIGNIFICANT THAT "VIRTUALLY ALL OF THE EVIDENCE OFFERED BY EITHER SIDE" EMANATES FROM CONDUCT OCCURRING THERE DOES NOT CONSTITUTE UNCONSTITUTIONAL EXTRATERRITORIAL REGULATION 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

A. S. Goldmen & Co. v. New Jersey Bureau of Securities, 163 F.3d 780 (3d Cir. 1999) 20

Adams v. Robertson, 520 U.S. 83 (1997) 6

Blessing v. Freestone, 520 U.S. 329 (1997) 6

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) ..... *passim*

Avery v. State Farm Mut. Auto. Ins. Co., 201 Ill.2d 560, 786 N.E.2d 180 (2002) 5

Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242 (Ill.App. 2001) 16

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 6, 18, 19

Clark v. TAP Pharmaceutical Products, Inc., 798 N.E.2d 123 (Ill.App. 2003) 16

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 3

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) 1, 2

Debbs v. Chrysler Corp., 810 A.2d 137 (Pa.Super. 2002) 17

Florida v. Thomas, 532 U.S. 774 (2001) 5

Franchise Tax Board of California v. Hyatt, ___ U.S. ___, 123 S. Ct. 1683 (2003) 21, 22

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 2

Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219 (9th Cir. 2003) 20

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 22

TABLE OF AUTHORITIES – Continued

Page

Healey v. Beer Institute, Inc., 491 U.S. 324 (1989) ... 6, 18, 19

Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675 (Tex. 2002) ... 16

Home Ins. Co. v. Dick, 281 U.S. 397 (1930) ... 14, 15

Instructional Systems, Inc. v. Computer Curriculum Corporation, 35 F.3d 813 (3d Cir. 1994) ... 20

In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 333 F.3d 763 (7th Cir. 2003) ... 4

Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir 1987) ... 16

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) ... 21

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ... *passim*

Southland Corp. v. Keating, 465 U.S. 1 (1984) ... 2

State Farm Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, 123 S. Ct. 1513 (2003) ... 18, 19

Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349 (Tex.App. 2003) ... 17

Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986) ... 17

Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180 (9th Cir. 2001) ... 16

STATUTES

Okla. Stat. tit. 12, § 2023(c)(1) ... 1, 3

28 U.S.C. § 1257(a) ... 1

28 U.S.C. § 1291 ... 3

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. Rule 14.1(a) 6

Fed. R. Civ. P. 23(f) 3

Okla. Sup. Ct. R. 1.11(k)(1) 6

AGENCY DECISIONS

Denial of Motor Vehicle Defect Petition, 62 FR 41477 (Aug. 1, 1997) 7

OTHER AUTHORITIES

Deborah R. Hensler, Revisiting the Monster: *New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179 (2001) 17

Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)*, 56 Okla. L. Rev. 289 (2003) 10

Restatement (Second) Conflict of Laws § 6 ..... 12, 13

Restatement (Second) Conflict of Laws § 188(2) 12

Restatement (Second) Conflict of Laws § 191 12

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the reasons noted herein, respondents, Sheryl Ysbrand and Mary Cooney, respectfully pray that this Court deny the petition filed by petitioner, DaimlerChrysler Corporation ("DCC") seeking review of the interlocutory rulings of the Oklahoma Supreme Court.

JURISDICTION

The ruling below represents an interlocutory appeal of the state trial court's decision to certify a class – a ruling that the Oklahoma Supreme Court recognized "remains subject to modification and 'may be altered or amended before the decision on the merits.'"[1] As the jurisdiction of this Court to review state court decisions extends only to "*[f]inal* judgments or decrees rendered by the highest court of a State," no jurisdiction exists for this Court to grant review.[2]

Recognizing the problem, DCC argues for the application of the fourth exception to finality recognized by this Court in *Cox Broad. Corp. v. Cohn,* which permits review when:

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue

[1] Pet. App. at 20a, n.8 (quoting Okla. Stat. tit. 12, § 2023(c)(1)).

[2] 28 U.S.C. § 1257(a) (emphasis added).

> by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.[3]

The *Cox* exceptions generally apply when "additional proceedings anticipated in the lower state courts . . . would not require the decision of other federal questions that might also require review by the Court at a later date," and the fourth exception is further limited by the requirement that "refusal [to] immediately to review the state-court decision might seriously erode federal policy."[4] For the reasons noted below, the fourth *Cox* exception is simply not applicable in this case.

As a preliminary matter, it is important to note that the jurisdictional arguments proffered by DCC provide no support for reviewing its extraterritorial regulation claim in this Court now. As will be noted herein,[5] DCC waived this claim by not raising it in its initial appellate brief below. As such, the Oklahoma Supreme Court did not address the claim. The fourth *Cox* exception is designed to prevent interlocutory holdings on important federal claims from becoming unreviewable precedent.[6] With respect to the extraterritorial regulation claim, however, there simply is no state court holding to become unreviewed

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[3] 420 U.S. 469, 482-83 (1975).

[4] 420 U.S. at 477, 483.

[5] *See, infra,* pp. 5-6.

[6] *Cox Broadcasting,* 420 U.S. at 485; *see also Southland Corp. v. Keating,* 465 U.S. 1, 7 (1984); *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 179-180 (1988).

precedent. In any event, with respect to both the extraterritorial regulation claim and the alleged improper application of *Phillips Petroleum Co. v. Shutts*,[7] the fourth *Cox* exception is simply not applicable in this case.

First, the federal issue has not been finally decided by the state court. The nature of the ruling is a class certification order which, as noted above, may be altered or amended before the decision on the merits. Class certification orders remain interlocutory because they are decided as "soon as practicable after the commencement of an action" brought as a class action.[8] In this case only minimal discovery was undertaken prior to the certification order. For this reason, this Court has held that appellate review of district court orders granting or denying class certification do not fall within the collateral order exception to the finality requirement of 28 U.S.C. § 1291.[9]

Second, review now is inappropriate as it is clear that this case presents other federal questions that might also require review by this Court at a later date. Regardless of which state's law applies to the underlying claims, DCC

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[7] 472 U.S. 797 (1985).

[8] Okla. Stat. tit. 12, § 2023(c)(1).

[9] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (reversing court of appeals decision to review opinion denying certification noting: "An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Second, the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . . For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case." (citations and footnotes omitted)); *cf.* Fed. R. Civ. P. 23(f) (1998 amendment legislatively overruling *Coopers & Lybrand* in federal court class actions).

contends that the claims of the named plaintiffs and the entire class are preempted by federal law. The motion to dismiss on this basis was denied by the trial court and might require review by this Court.[10] Moreover, class actions often raise a number of federal due process claims arising out of both the notice and opt-out process and the trial plan ultimately used.[11]

Application of this limitation of *Cox* is especially appropriate in this case. These other possible federal questions will remain even if this Court reverses the state courts' rulings on the federal issues raised herein as the holding below approving treatment of this case as a class action will still support class certification of narrower classes.[12] Even a complete reversal of the class certification would not preclude litigation (of these allegedly preempted claims) by the individual named plaintiffs. Because these federal questions (and any number of other federal issues) may require review by this Court after final judgment, it would be inappropriate to review this case under the fourth *Cox* exception at this early stage.

Reversal of the choice of law ruling on the federal issue would not be preclusive of any further litigation on the relevant cause of action. Rather, a choice of law decision would merely be "controlling [of] the nature and

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[10] *See* District Court Order Denying Motion to Dismiss, *Ysbrand v. DaimlerChrysler Corp.* (Feb. 14, 2002).

[11] *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 800-01 (1985) (addressing due process with respect to class notice).

[12] *See, e.g., In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763, 766 (7th Cir. 2003) (previous decision reversing choice of law ruling and denying national class certification "contemplated that states would certify narrower classes . . . ").

character of the claim" in the state proceedings still to come. The underlying UCC warranty claims exist whether the court applies Delaware, Oklahoma, or Michigan law. A ruling on choice of law is a "run-of-the-mine decision" that can await final judgment for review.[13] If these class certification decisions occur with the frequency that petitioner suggests, this Court will soon have the opportunity to review these issues upon review of a final judgment.[14]

Finally, DCC seeks certiorari based upon the claim that the state courts' decisions to apply Michigan law violate both due process under *Shutts* and the commerce clause's bar on regulation of conduct occurring wholly outside the boundaries of the state. This Court has no jurisdiction to review the alleged extraterritorial regulation claim as DCC failed to preserve this argument for review. The commerce clause argument was not raised in the trial court in opposition to certification.[15] Nor was improper extraterritorial regulation raised as a defense in petitioner's answer which was filed by DCC after it initiated its state court appeal.[16] While the argument was noted in its statement docketing the state court appeal,[17] DCC did not brief the argument that the application of Michigan law violated the commerce clause or otherwise constituted unconstitutional extraterritorial regulation.

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[13] *Florida v. Thomas*, 532 U.S. 774, 781 (2001).

[14] *See, e.g., Avery v. State Farm Mutual Automobile Insurance Co.*, 201 Ill.2d 560, 786 N.E.2d 180 (2002) (granting appeal to consider final judgment in favor of national class tried under single state's law).

[15] *See* Pet. App. 68a-73a (petitioner's trial court Opposition to Class Certification).

[16] *See* Pet. App. 74a-76a (petitioner's Answer filed March 26, 2002).

[17] *See* Pet. App. 88a-89a (Petition in Error filed March 15, 2002).

Petitioner's sole reference to the issue appeared as part of a policy argument that regulation by the National Highway Traffic Safety Administration was superior to class adjudication.[18] Because petitioner waived the constitutional extraterritorial regulation claim by not specifically raising it in its brief in chief, the Oklahoma Supreme Court did not address the claim in its opinion.[19] As such, this claim cannot be raised here.[20]

STATEMENT OF THE CASE

In 1996 and 1997, one hundred percent of all child airbag minivan deaths occurred in minivans manufactured by DCC. (TR 258, Exh. B at pp. 41-42) In addition, a significant number of adults, primarily of smaller stature, have also been killed or seriously injured by airbags in DCC minivans. (*Id.*) Respondents are the representatives of a class of the purchasers of 1996-1997 model minivans manufactured by DCC who seek remedies for the breach of

[18] *See* Pet. App. 88a-89a (petitioner's Brief in Chief noting "allowing one state to apply its laws in a manner which regulates automotive safety policy within the purview of NHTSA threatens basic principles of federalism – recognized in *Healey v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996)").

[19] *See* Okla. Sup. Ct. R. 1.11(k)(1) ("Issues raised in the Petition in Error but omitted from the brief may be deemed waived. Argument without supporting authority will not be considered.").

[20] *See Adams v. Robertson*, 520 U.S. 83 (1997) (with very rare exceptions, Supreme Court reviewing state court judgments will not consider petitioner's federal claim unless it was either addressed by or properly presented to state court; citation of relevant case in brief for entirely different argument is insufficient); Sup. Ct. Rule 14.1(a); *Blessing v. Freestone*, 520 U.S. 329, 340, n.3 (1997).

warranty committed by DCC in manufacturing, marketing, and selling these vehicles.

DCC manufactured and sold over one million of the subject minivans as family vehicles, each containing a passenger airbag that is defective and dangerous to humans (both children and smaller statured adults) who are not the 160 pound males for which the bag was designed. (TR 258, at p. 5 & Exh. A) This airbag is so dangerous that even DCC is unwilling to continue to use the components in these airbags as replacement parts in the very 1996-1997 vehicles that are the subject of this litigation. Instead, it uses a lower powered airbag as its official replacement part. (TR 258 at 6; *see also* Plaintiffs' Response to Defendants' Motion for Stay, p. 5 & Exh. B) Nor does DCC use this dangerous airbag as original equipment in its post-1997 minivans. (*Id.*) Like the replacement part, DCC started using depowered airbags as original equipment beginning in its 1998 minivans. (*Id.*) As DCC's current conduct establishes, neither technology nor governmental regulation required it to use the defective, overpowered airbag it chose.

Those seeking a solution to this problem from the National Highway Traffic Safety Administration ("NHTSA") were turned away based on "the need to allocate and prioritize NHTSA's limited resources."[21] Consequently, respondents turned to the courts and initiated the instant class action. Following the setting of an agreed schedule for the consideration of class certification, the trial court below certified this case as a class action. (Pet. App. at 3a-4a)

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[21] Denial of Motor Vehicle Defect Petition, 62 FR 41477, 41481 (Aug. 1, 1997).

In determining whether to certify this case as a class action, the courts below addressed the issue of what law applied to the fraud and warranty claims brought by respondents on behalf of the class. In making that determination, the Oklahoma courts applied Oklahoma's existing choice of law rules. With respect to both the warranty and fraud claims, the Oklahoma courts applied the tests set forth in the Restatement (Second) of Conflict of Laws. (*See* Pet. App. 11a, 14a) With respect to the fraud claims, the Oklahoma Supreme Court determined that Oklahoma's choice of law rules mandated the application of the laws of the purchaser's state. (*Id.* at 16a) With respect to the contract based warranty claims, the Oklahoma Supreme Court determined that Michigan law applied to the warranty claims of all of the purchasers. (*Id.* at 13a-14a)

The decision that Oklahoma's previous adoption of the Second Restatement's "most significant relationship test" required the application of Michigan law to the warranty claims of each of the class members was based on a substantial record *provided by petitioner* regarding Michigan's relationship to each class member. While it is true that DCC is a Delaware corporation with its headquarters and principal place of business in Auburn Hills, Michigan, (Def. Class Cert. Ex. I, Van Der Wiele Affid., ¶ 1), the contacts between each class members' claim in this case and Michigan are even more substantial. For example, petitioner contended below that "[v]irtually all DCC personnel who may be called to testify in this matter are located in the State of Michigan." (*Id.* at ¶ 6) Similarly, DCC admitted that its personnel track the owners of the subject vehicles in Michigan, manage warranty work on the subject vehicles in Michigan, make design decisions

regarding the subject vehicles and the subject airbags in Michigan, and review and approve the marketing plans for the subject vehicles in Michigan. (*Id.* at ¶¶ 3, 6) Moreover, according to petitioner, virtually all of the millions of pages of documents requested by respondents in discovery are located in Michigan. (*Id.* at ¶ 4) Petitioner summed it up best when it argued below that this action is "*based on the design of airbags manufactured . . . by personnel located in Michigan,*" and "(t)hus, *virtually all the evidence offered by either side will relate to Chrysler's airbags and the adequacy of design decisions made in Michigan by Chrysler employees and third parties.*" (Chrysler Corporation's Reply to Plaintiff's Response to Motion To Dismiss, pp. 1, 6 (emphasis added)) Based upon this record the Oklahoma Supreme Court concluded that Michigan has the most significant relationship to the transaction and the parties with respect to each class members' claim because "Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made." (Pet. App. 13a, ¶ 15) Finally, the Court tested its application of the Oklahoma rule against this Court's constitutional limitations and found the determination "constitutionally permissible" under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). (*Id.* at 14a, ¶ 16). Following the denial of DCC's petition for rehearing below, DCC now seeks review in this Court.

REASONS FOR DENYING THE WRIT

The 51 state courts in our federal system are each expressly permitted to choose their own choice of law rule so long as the rule and its application do not violate

certain minimum standards. While petitioner offers a number of policy reasons why the rule chosen in this case was supposedly wrong, "*Ysbrand* is, by definition, a correct articulation and application of Oklahoma conflicts principles."[22] The question here is not whether this Court (or even the Michigan Supreme Court) would adopt the same rule – the question is whether the United States Constitution is offended by a state court applying the law of the state which is the source of "virtually all of the evidence offered by either side" in the case. The Oklahoma Supreme Court's decision to answer this question in the negative (especially in the context of an interlocutory ruling) is not one that is worthy of a grant of certiorari by this Court.

I. THE APPLICATION OF THE LAW OF THE STATE WITH CONTACTS SO SIGNIFICANT THAT "VIRTUALLY ALL OF THE EVIDENCE OFFERED BY EITHER SIDE" EMANATES FROM CONDUCT OCCURRING THERE COMPORTS WITH DUE PROCESS AND THIS COURT'S DECISIONS IN *SHUTTS* AND *ALLSTATE*.

A. The Decision Below Represents a Straightforward Application of this Court's Opinions in *Shutts* and *Allstate*.

In the decision below the court applied the Second Restatement test and found that Michigan had the most significant relationship to the transaction and the parties. The court then turned to the one constitutional challenge made by petitioners below. In addressing the issue, the

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[22] Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)*, 56 Okla. L. Rev. 289, 301 (2003).

Oklahoma Supreme Court correctly noted this Court's precedent regarding the constitutional limitations on choice of law decisions: "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[23] The court then found that the same factors that led to the conclusion that Michigan had the most significant state interest were sufficient to create a "significant aggregation of contacts" under *Shutts*. That these contacts exist and are sufficient in this case when "virtually all the evidence offered by either side" will emanate from Michigan cannot be seriously disputed.

The suggestion that the substantial contacts with Michigan in this case are insignificant is clearly frivolous. Thus, with respect to every class member, as "virtually all the evidence offered by either side will relate to . . . decisions made in Michigan," aggregation of the contacts is not necessary to comply with *Shutts* These identical contacts with Michigan (that are held by every class member) are clearly sufficient to distinguish this case from *Shutts* and the other cases cited by petitioner in which there were ***no*** significant contacts with state whose law was applied.

Because Petitioner cannot challenge the *results* of the application of the Oklahoma choice of law rule in this case, it seeks to distort the holding of both the court below and *Shutts*. Petitioner's argument is that by allegedly adopting

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[23] Pet. App. at 14a, ¶ 16 (quoting and citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

a special choice of law rule for class actions, the Oklahoma Supreme Court opinion violated *Shutts* regardless of the results of the rule. Both the premise and the conclusion are false.

First, the court below did not hold that the fact that this case was a class action allowed it to apply a different choice of law rule. What the court did do was apply sections 188(2) and 191 of the Second Restatement (the provisions dealing with contracts) and evaluate the relevant "contacts . . . according to their relative importance with respect to the particular issue[s]" involved in this case.[24] The court then checked its analysis by reviewing the general choice of law factors contained in section 6 of the Second Restatement and found that the general policies set forth in section 6 were not offended by the application of the result obtained under sections 181(2) and 191.[25] This analysis represents a straightforward application of the Second Restatement to this case, not an adoption of a special rule applying to class actions.

If there is any doubt, one need look no further than the court's analysis of the choice of law regarding the fraud claim. If the court was altering its ordinary choice of law rules to accommodate class action policies, the same alleged accommodation would have been applied to the choice of law determination on the fraud claims. Instead, the Court found that the Second Restatement test resulted in the application of the laws of 51 jurisdictions.[26]

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[24] *Id.* at 12a-13a, ¶¶ 13-15.

[25] *Id.* at 13a-14a, ¶ 16.

[26] *Id.* at 14a-16a, ¶¶ 17-18.

Contrary to the suggestion by petitioner, the due process clause analysis under *Shutts* does not require an examination and weighing of every contact with every class member – instead, it only requires that the law ultimately chosen be supported by "a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Thus, as long as the law ultimately chosen complies with the *Shutts*, due process did not require the courts below to individually examine all the contacts for each class member.

To the extent that *Shutts* imposes any constitutional requirement that there be an "individualized" choice of law analysis undertaken apart from assuring that significant contacts exist for each class members' claim, this requirement was met by the Oklahoma Supreme Court's consideration of the record submitted by the parties that allowed it to make conclusions regarding the relative interests of "each buyer's home state."[27] Moreover, as the nature of the dispute for every class member centers on the design and manufacture of the identical defective airbags in Michigan, the conclusion that the Michigan contacts are significant applies equally to every individual purchaser. Thus, as the record establishes that significant contacts with Michigan exist for every class member, "individual" analysis results in the same conclusion.

While the premise of DCC's argument (that the court below applied a different rule in a class action) is incorrect, so is the conclusion that due process would be offended if the status of this case as a class action influenced the outcome of the analysis. It should be noted that Second

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[27] *Id.* at 13a, ¶ 15.

Restatement § 6(g) allows consideration of the ease in the determination of the law to be applied. That due process does not require every Court to reach the same conclusion regarding choice of law is both obvious from the fact that each state has its own choice of law rules and an idea that was clearly and specifically rejected by this Court in *Shutts*.[28] Since due process does not mandate one national choice of law rule, due process does not prohibit choice of law rules that are applied differently when a case is brought as a class action based on considerations such as ease of application. While *Shutts* held that the status of a case as a class action could not be used to make a constitutionally impermissible choice of law permissible, this Court provided no restrictions on how a state decides between several constitutionally permissible choices of law. Under *Shutts,* due process merely requires a significant aggregation of contacts – a test easily met in this case regardless of whether the case is a class action.

Finally, petitioner argues that this Court's opinion in *Home Ins. Co. v. Dick,*[29] would preclude respondents from bring an individual suit in Oklahoma arguing that Michigan law applies. This is indeed a strange argument coming from petitioner who, with others in the automotive industry, commonly seek the application of Michigan law and its ban on punitive damages to non-Michigan purchasers

[28] *Shutts,* 472 U.S. at 823 (subject to limitation that choice of law be based on significant contact or significant aggregation of contacts, "we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law.").

[29] 281 U.S. 397 (1930).

when one of their defective products injure someone.[30] In any event, *Dick* is distinguishable from this case for the same reason as *Shutts*. Unlike this case, in *Dick* and *Shutts* the law to be applied bore no relationship to the parties or the transaction. On this record, Ms. Cooney, or any of the other class members, *could have* convinced an Oklahoma court to apply Michigan law to her individual dispute without running afoul of the due process clause because "virtually all of the evidence offered by either side" relating to the issues in dispute in the case would come from Michigan.

B. Whatever Conflict Exists Between the Decision of the Oklahoma Supreme Court and the Opinions of other State Supreme Courts and U.S. Courts of Appeals is Based Upon the Application of this Court's Opinions in *Shutts* and *Allstate* to the Facts of those Cases not Differences in Interpretation of *Shutts* and *Allstate*.

Petitioner has identified a number of decisions which apply different choice of law tests and reach different choice of law *conclusions*. The conclusions are different because the courts used different choice of law rules which were applied to different facts. With respect to the question here, whether the choice of law rule comports with *Shutts*, an analysis of these cases reveals consistent interpretation of the decision.

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[30] *See* Appellee's Combined Response to Briefs of Amicus Curiae, p. 9 & nn.27-29 and exhibits (citing examples of automotive manufacturers (including DCC) arguing for the application of Michigan law and its ban on punitive damages in non-class product liability suits brought outside of Michigan by non-Michigan purchasers).

One factor in reconciling the various decisions is the presence of choice of law rules that are different than the one applied by the court below – either in name[31] or application.[32] Another factor is the differing factual record in the cases rather the acceptance of a single state's law in the absence of contacts that would satisfy *Shutts*.[33] A third factor distinguishing the cases denying the application of a single state's law is an incomplete choice of law analysis by the court or the parties.[34]

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[31] *Compare, Ysbrand, supra* (applying Second Restatement test) *with Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1187-88 (9th Cir. 2001) (applying California's impairment of interests test); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir 1987) (applying Georgia's modified *lex loci delecti* rule); *cf. Clark v. TAP Pharmaceutical Products, Inc.*, 798 N.E.2d 123, 129-130 (Ill.App. 2003) (allowing Illinois consumer protection act to govern non-Illinois sales).

[32] *Compare Ysbrand, supra* (applying Second Restatement test resulting in application of single state's law) *with Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 697-698 (Tex. 2002) (refusing to find that state where products were manufactured and designed was state with most significant relationship under Second Restatement test).

[33] *Compare Ysbrand, supra* ("Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made."); *Clark, supra* (practices regarding "Lupron were designed, established, and initiated from the defendants' marketing and sales agents located at the defendants' corporate headquarters in Illinois"); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254-1255 (Ill.App. 2001) ("There is substantial evidence the deceptive claims practices were designed, established, and initiated from State Farm's corporate headquarters in Bloomington, Illinois") *with Zinser,* 253 F.3d at 1187 n.5 ("Although ARI is now headquartered in Colorado, Zinser has not demonstrated that it was headquartered there when the 854 leads were designed, manufactured, and distributed.")

[34] *Zinser,* 253 F.3d at 1188 ("Zinser does not explain how each non-forum state's law differs from California law, whether each non-forum state has an interest in having its law applied, or whether each non-forum state has an interest outweighing California's interest."); *Kirkpatrick, supra* ("although the law of Georgia might eventually be applied on some

(Continued on following page)

What is absent from the petitioner's review of these decisions is any meaningful analysis of how these decisions represent inconsistent interpretations of *Shutts* rather than the adoption and application of different state choice of law rules to different facts. As noted above, the appellate decisions accepting the argument that a single state law applies to a dispute all do so in the context of a record that supports compliance with *Shutts*. Similarly, the decisions rejecting the application of a single state's law do so based on non-constitutional grounds in spite of citations to *Shutts*.[35] The petitioner's premise – that when courts accept (or reject) application of a single state's law they have interpreted *Shutts* differently – is simply wrong.

Finally, petitioner makes many policy arguments against allowing courts to certify national class actions after finding a single state's law should apply. The reason behind the increase in class actions are new socioeconomic trends not "greedy lawyers" as even the author of the RAND study cited by petitioner recognizes.[36] In any event,

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claims involving purchases made in other states, that could be determined only after the district court had fully surveyed the law of the states of purchase."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016, n.90 (D.C. Cir. 1986) ("The judge did not say whether she had in mind applying the law of one particular state to all members of the nationwide class."); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 159 (Pa.Super. 2002) ("The record fails to reflect an analysis of the choice-of-law issue.").

[35] *See, e.g., Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 355 (Tex.App. 2003) (noting due process limits exist but deciding choice of law issue on state-law grounds).

[36] Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 212 (2001) (rejecting argument that class litigation is a "monster" and positing that large-scale litigation is consequence of socio-economic trends such as rise of multi-national corporations that bring with them potential for large-scale injuries and information science

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the choice between different constitutional policy decisions regarding the existence and venue for class claims is one for the state legislatures, state courts and Congress – not for this Court to review interlocutory class certification opinions from state courts.

II. THE APPLICATION OF THE LAW OF THE STATE WITH CONTACTS SO SIGNIFICANT THAT "VIRTUALLY ALL OF THE EVIDENCE OFFERED BY EITHER SIDE" EMANATES FROM CONDUCT OCCURRING THERE DOES NOT CONSTITUTE UNCONSTITUTIONAL EXTRATERRITORIAL REGULATION.

Petitioner's final constitutional argument is that the Oklahoma Supreme Court's choice of Michigan law violates the prohibition on the extraterritorial application of one state's law to conduct in another state. This argument is based on the unstated premise that there is no relationship between Michigan and this dispute. This premise and the legal conclusions drawn from it are false. Indeed, if this Court adopts DCC's argument, no state would be permitted to ever apply another state's law – a result that would ultimately conflict with this Court's holdings in *Shutts*.

Petitioner relies on *Healey v. Beer Institute, Inc.*,[37] *BMW v. Gore*,[38] *State Farm Mut. Auto. Ins. Co. v. Campbell*[39] and other similar opinions. The prohibitions in these

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revolution including development of the Internet, which have provided means for people to become informed of potential claims).

[37] 491 U.S. 324 (1989).

[38] 517 U.S. 559 (1996).

[39] ___ U.S. ___, 123 S. Ct. 1513 (2003).

opinions are not as broad as petitioner seeks to make them.

First, it is important to note that none of these opinions prohibit a state from applying another state's law so long as the dictates of *Shutts* are met. *Healey* merely prohibits the application of one state's law to conduct wholly occurring outside that state. Similarly, *Gore* prohibits a state from applying its law to punish wholly out-of-state conduct that was legal where it occurred, and *Campbell* holds that a state cannot apply its law to "punish a defendant for unlawful acts committed outside of the state's jurisdiction."[40] In this case, Michigan law applies because the conduct being regulated occurred there. For these reasons, the prohibitions in *Healy, Gore* and *Campbell* simply do not apply.

The argument being advanced based on these cases would lead to the conclusion that no state may ever apply another state's law to a dispute – a conclusion directly contrary to the holdings of *Shutts* and *Allstate* noted above. None of these cases bar a class action where a court determines that the law of one state applies nationally to the dispute. Indeed, petitioner's citation to *Campbell* on this point is particularly inappropriate as *Campbell* explicitly distinguished the case where all persons harmed by the conduct occurring outside the state were parties and the conduct was judged under a choice of law rule that complies with *Shutts*.[41] Thus, under *Campbell* a choice of law decision joining all the

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[40] 123 S. Ct. at 1522.

[41] *Campbell*, 123 S. Ct. at 1522 (citing *Shutts*, 472 U.S. at 821-822).

class members as parties and complying with *Shutts* does not constitute unconstitutional extraterritorial regulation.

There is nothing unconstitutional in this result. In any case involving contracts between citizens of different states, a court must choose which state's law to apply. Choosing to apply the law of the state where the seller resides is, from the standpoint of the commerce clause, no more suspect than choosing to apply the laws of the buyers' states. "The . . . modern approach is to recognize that contracts formed between citizens in different states implicate the regulatory interests of both states. Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract."[42] The choice of law decision simply involves balancing those interests, and "[w]hile a contract which covers multiple states may raise a difficult choice-of-law question, once that question is resolved there is nothing untoward about applying one state's law to the entire contract, even if it requires applying that state's law to activities outside the state."[43]

A contrary rule would not be workable as the resulting rule would be contrary to the holding in *Shutts*. In *Shutts*, the Court *required* the application of the foreign state's laws when the forum had no significant contacts with the parties or the dispute. Take the individual case of Ms.

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[42] *A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, 163 F.3d 780, 787 (3d Cir. 1999).

[43] *Instructional Systems, Inc. v. Computer Curriculum Corporation*, 35 F.3d 813, 825 (3d Cir. 1994); *accord, Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1225 (9th Cir. 2003).

Cooney, a Delaware resident. Under petitioner's *Shutts'* argument, the Oklahoma Court must apply Delaware law. Under the commerce clause argument advanced by petitioner, however, the application of Delaware law would constitute unconstitutional extraterritorial regulation by the Oklahoma court. To accept petitioner's argument would make choice of law determinations in many cases unworkable.

Petitioner also argues that both the commerce clause and the due process clause are violated by the holding of the opinion below because the courts of Oklahoma allegedly have insufficient contacts with the dispute of the non-Oklahoma class members. Petitioner cites no direct authority for either of these propositions. Petitioner's suggestion that the concurrence in *Allstate* requires more than that the law that the court ultimately applies be based on a significant contact or significant aggregation of contacts is directly contrary to *Shutts*.[44] This Court has never required the forum court to establish significant contacts in order to apply its choice of law rule. The presence of the case in the forum is sufficient to allow the court to pick the choice of law rule as long as the result of the application of the rule does not violate the due process test set forth in *Shutts*.[45]

This Court has traditionally refused to graft constitutional requirements beyond compliance with *Shutts* to choice of law decisions. For example, in *Franchise Tax*

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[44] *Shutts*, 472 U.S. at 823; *see also Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) (rejecting federal conflict of law rule in diversity cases).

[45] *Cf. Klaxon Co., supra* (requiring federal courts in diversity cases to uniformly apply the conflict of law rule of forum state).

Board of California v. Hyatt, this Court rejected a claim that the choice of law violated the full faith and credit clause holding that any choice of law that satisfies *Shutts* cannot, by definition, violate the clause.[46]

Moreover, the supposed "substantive conflict" between the different laws is largely illusory. Indeed, in a decision of the Ninth Circuit when petitioner supported class adjudication through a national settlement of automobile warranty claims, the court noted that the laws of the various states are "generally homogenous" and the "idiosyncratic differences" between the laws of the states are not "sufficiently substantive" to create significant differences in the claims of the class members.[47]

Implicit in petitioner's argument is the assumption that the national class certification in this case is significant. One wonders if the court below had merely ruled that the contract claims of Cheryl Ysbrand of Oklahoma and Mary Cooney of Delaware were governed by Michigan law when "virtually all the evidence offered by either side" will emanate from Michigan would have triggered this objection. Of course the answer is no, and, indeed, the suggestion that class certification changes the constitutionality of the choice of law analysis is contrary to petitioner's argument that class certification should be ignored in conducting choice of law analysis.

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[46] ___ U.S. ___, 123 S. Ct. 1683 (2003).

[47] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-1023 (9th Cir. 1998).

CONCLUSION

The arguments raised by petitioner are both procedurally inappropriate and substantively without merit. Consequently, this Court should deny the petition.

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(7)

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

I. The Conflict Among Federal And State Courts Has Widened Since The Petition Was Filed 1

II. The Judgment Below Is Final For Purposes Of This Court's Review 6

III. The Constitutional Issues Are Preserved 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994) 10

Blair v. Equifax Check Services, 181 F.3d 832 (7th Cir. 1999) 8

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 10

Boynton v. Virginia, 364 U.S. 454 (1960) 10

Compaq Computer Corp. v. Lapray, No. 02-0705, __ S.W.3d __, 2004 Tex. LEXIS 435 (May 7, 2004) 2, 3

Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) 10

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 7, 8

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 8

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 5

Florida v. Thomas, 532 U.S. 774 (2001) 7

Georgine v. Amchem Products, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) 3

Healy v. Beer Institute, 491 U.S. 324 (1989) 5, 9, 10

Home Insurance Co. v. Dick, 281 U.S. 397 (1930) 6

In re Air Bag Products Liability Litigation, 7 F. Supp. 2d 792 (E.D. La. 1998) 3

In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 333 F.3d 763 (7th Cir. 2003) 1

Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 7

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... *passim*

Richardson-Merrell Inc. v. Koller, 472 U.S. 424 (1985) 7

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) 6

Statutes

28 U.S.C. § 1257 8

28 U.S.C. § 1291 7

Rules

FED. R. CIV. P. 23(f) 8

SUP. CT. R. 10(b) 4

Other Authorities

CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE (2d ed. 1996) 8

REPLY BRIEF FOR PETITIONER

The sum of respondents' argument in opposition to certiorari is that the petition is premature: that this Court's review will not be warranted until more lower courts endorse the Supreme Court of Oklahoma's errant analysis, and until after some nationwide class action is litigated to verdict and appealed through the state judiciary. But the willingness of even a *single* jurisdiction to certify nationwide class actions in violation of the Constitution threatens to hold the entire American economy hostage to parochial whim. *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003) (Easterbrook, J.). Oklahoma and the minority of jurisdictions that have departed from this Court's holdings in such cases as *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), have created magnets for nationwide class litigation. Those jurisdictions will continue to set policy for the entire country unless and until this Court resolves the conflict. This case presents an appropriate vehicle for this Court to do precisely that.

I. The Conflict Among Federal And State Courts Has Widened Since The Petition Was Filed

Respondents barely address the divide among federal and state courts concerning constitutional restraints on nationwide-class certification; respondents focus instead on the merits of the constitutional issue. But they do not refute the need for this Court to resolve the conflict, which was already developed when the petition was filed: Oklahoma and Illinois take a position diametrically opposed to most other jurisdictions' (and California takes an intermediate stance). *See* Pet. 13-20. The divide has only *widened* since that time: expressly relying on the federal Due Process Clause, the Supreme Court of Texas recently de-certified a nationwide class of plaintiffs asserting *precisely the same type of Uniform Commercial Code warranty claim* as in this case.

1. In *Compaq Computer Corp. v. Lapray*, No. 02-0705, __ S.W.3d __, 2004 Tex. LEXIS 435 (May 7, 2004), the plaintiffs sought certification of a nationwide class based on the UCC's warranty provisions as adopted in Texas, where Compaq was headquartered. As in this case, the warranty claims were based on "unmanifested defects." And, as Oklahoma does, Texas applies the *Restatement*'s "most significant relationship" test for choice of law. Nonetheless, after the trial court certified a nationwide class, the Supreme Court of Texas unanimously reversed, holding that the *Restatement*'s test could not constitutionally be applied as urged by the plaintiffs. *Id.* at *62-*66.

The Texas Supreme Court began from the proposition that "[t]he Due Process Clause limits the extent to which one state's law can be applied to claims that arise in many states." 2004 Tex. LEXIS 435, at *62-*63 (citing *Shutts*, 472 U.S. at 821-22). Examining the contacts between Texas and the individual claims against Compaq, the court then held that the mere presence of Compaq's headquarters in Texas was insufficient to warrant classwide application of Texas law. All of the plaintiffs' home States "are likely to be interested in ensuring that their consumers are adequately compensated for a breach of warranty"; indeed, some may conclude that "Texas law may not provide sufficient consumer protection." *Id.* at *64-*65. The court therefore concluded that "the class representatives ha[d] failed to demonstrate [Texas law] will apply to the claims of out-of-state class members," and held that each plaintiff's claim would be governed by the law of that plaintiff's home State. *Id.* at *64-*66.

Significantly, the Texas court also determined that the fifty States have adopted substantively different interpretations of the UCC's warranty provision—and specifically that many States do not recognize the type of "no-injury" claims based on unmanifested alleged defects that are at issue in *Compaq* and in this case. 2004 Tex. LEXIS 435, at *60-*62.

Compaq thus is directly contrary to the decision below, and to respondents' position, in two key respects. First, it directly contradicts their attempt to explain the divide in the lower courts as "courts us[ing] different choice of law rules which were applied to different facts." Opp. 15. *Compaq* considered a warranty claim just like the respondents' and applied the *Restatement* just as the opinion below purported to do, but—invoking federal constitutional limits on those choice of law principles—reached the opposite result.

Second, *Compaq* compellingly refutes respondents' assertion that "the supposed 'substantive conflict' between the different laws is largely illusory." Opp. 22. The Texas court showed in detail that the laws of the fifty States are in conflict concerning the availability of "no-injury" warranty claims. "Some states may recognize such claims, but we cannot say that all fifty-one jurisdictions would." 2004 Tex. LEXIS 435, at *61; *see also* Pet. 22; *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 803-04 (E.D. La. 1998) (citing cases). *Compaq* therefore confirms that the Oklahoma court's failure to undertake a choice of law analysis consistent with due process principles was not a harmless error, because the selection of Michigan law would be outcome-determinative for many plaintiffs. *See, e.g.*, *Shutts*, 472 U.S. at 816. Indeed, while in *Compaq* the court declined to hold that *Texas* permits recovery for unmanifested defects (*see* 2004 Tex. LEXIS 435, at *61 & n.15), across the Red River to the north, the courts of Oklahoma will allow *Texas plaintiffs* to recover on just such claims, so long as they sue as part of a nationwide class.[1]

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[1] Respondents also ignore the conflict among the federal courts of appeals and state courts of last resort that existed even before *Compaq*. Pet. 10-18. These courts are divided over whether the Constitution requires "an individualized choice of law analysis" with respect to "each plaintiff's claims." *Georgine v.*

2. Respondents also resist certiorari on the ground that the Oklahoma Supreme Court *did not* adopt "a special [choice of law] rule applying to class actions." Opp. 12. That assertion is demonstrably false. While the Oklahoma court did note that "Michigan is the only state where conduct relevant to all class members occurred" (Pet. App. 13a), as respondents observe, the only "relevant" conduct under that analysis was the presence of DCC's headquarters in Michigan, and the concomitant management decisions typically made in *any* company's headquarters. The key to the choice of law rule adopted below, as the court stressed, is that by design it selects a body of substantive law that overrides conflicting laws in other States: the rule "require[s] that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions." *Id.* at 13a-14a. This analysis specifically subordinates the regulatory interests of each plaintiff's home State to the goal of a single, nationwide adjudication.[2]

3. When respondents at last acknowledge the special class-friendly choice of law rule adopted in the decision below, they simply contend that such a rule comports with the Constitution. Opp. 13. That contention, even if correct, would be irrelevant for purposes of certiorari: this Court's review would be warranted to resolve the conflict that respondents ignore, even if the decision below were ultimately to be affirmed on the merits. *See* SUP. CT. R. 10(b).

In fact, however, the Oklahoma Supreme Court's decision also conflicts with this Court's constitutional holdings.

Amchem Prods., 83 F.3d 610, 627 (3d Cir. 1996) (citing *Shutts*), *aff'd sub nom. Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

[2] Respondents derive no benefit from the fact that the court below did not apply its special class-friendly rule to respondents' fraud claims. Opp. 12. The Oklahoma court's holding is not justified by the mere fact that its error was not compounded.

Respondents attempt to square the decision below with *Shutts*; *Healy v. Beer Institute*, 491 U.S. 324 (1989); and other cases by focusing on the fact that DCC is headquartered in Michigan. On respondents' reasoning, the Constitution *always* permits *any* court to apply Michigan law to *any* Michigan company, irrespective of the identity of the other parties or the interests of other States—and despite Michigan's *objections*, presented below and renewed in this Court.[3]

Under *Shutts*, Oklahoma plainly could *not* apply its *own* law to the plaintiff class, overriding the law of the other States with interests at stake. The same constitutional considerations preclude it from selecting *another* State's law to apply to the entire plaintiff class without an individualized analysis of the various interests at stake. If none of the States with conceivable interests in the regulated transaction—including Michigan, *see* Br. for Michigan 2—would apply Michigan law to out-of-state plaintiffs' claims, then Okla-

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[3] Respondents repeatedly emphasize that much of the *evidence* that would be adduced at trial would come from Michigan. But that shows only that the Oklahoma courts are an inconvenient forum, *not* that Michigan has sufficient contacts with the *transactions* at issue here (minivan sales occurring at dealerships throughout our Nation) to justify applying Michigan law. And to say that *DCC* has contacts with Michigan is not to say that any State in the Union would apply Michigan law to a Delaware plaintiff's warranty claim against DCC. Indeed, contrary to respondents' theory that any State can apply its law to transactions occurring *elsewhere* between companies headquartered in that State and citizens of other States, this Court's Commerce Clause cases carefully delimit individual States' authority to regulate corporate affairs: the state of *incorporation* (not of headquarters) can regulate purely *internal* corporate affairs such as the fiduciary duties of board members or the legal requirements for mergers. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *see id.* at 93 (a State "has no interest" in applying its law to corporations incorporated elsewhere).